FOR ARGUMENT.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-446

RAYMOND K. PROCUNIER, et al., *Petitioners,*

vs.

APOLINAR NAVARETTE, JR., *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CLOSING BRIEF FOR PETITIONERS

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ARGUMENT

NEGLIGENCE IS NOT A PROPER BASIS FOR RELIEF UNDER SECTION 1983

Respondent Navarette's complaint alleged that while he was imprisoned in 1971 and 1972, 13 items[1] of correspondence he delivered to petitioners (state

[1]In his brief (RB 2 n. 1), respondent Navarette states there were 25, not 13 letters. The complaint lists 13 items of correspondence which were not received, several of which were allegedly directed to multiple addressees (App. 6-8). It is these 13 items of mail to which we refer in our brief (Pet. Br. 3).

Respondent correctly points out (RB 5 n.6) that his counsel first appeared in this case in February 1973 (R 22), not February 1972 as was mistakenly noted in our opening brief (Pet. Br. 4 n.4). The inaccuracy was inadvertent and is regretted.

prison officials) for mailing were not received by his addressees.

The sole issue before this Court is whether respondent's third cause of action that state prison officials' negligence was the proximate cause of the non-receipt of the 13 items of mail by the addressees (App. 12-13), states a claim for damages under Title 42, United States Code, section 1983, for infringing his right of free expression.

Respondent Navarette now attempts to assert that he retains a cause of action for denial of access to the courts in the non-delivery of his mail (RB 3 n.2). As pointed out in our opening brief (PB 3 n.2), respondent's initial complaint alleged that interference with his mail also resulted in a denial of access to the courts, but that claim was dismissed (R 20, 171, 192). No appeal was taken and denial of access to the courts was not reasserted in the subsequent complaints (R 34, 95). The Court of Appeals expressed no opinion whether the allegation of mail interference stated a claim for denial of access to court or counsel (App. Pet. iii, n.1). This is not surprising since in respondent's brief in the district court he stated unequivocally: "The claim against mail interference does not purport to allege denial of access to the courts." (R 171:18). The disclaimer was repeated in his reply brief in the Court of Appeals (Reply Br. 7, 9): "The complaint does not purport to allege denial of access to any court."

Respondent Navarette also sees a footnote in *Monroe v. Pape,* 365 U.S. 167, 174 n.10 (1961), partially

quoting the remarks of Congressman Arthur of Kentucky as support for his negligence theory. (RB 13). The full passage reads as follows:

> ". . . But if the Legislature enacts a law, if the Governor enforces it, if the judge upon the bench renders a judgment, if the sheriff levy an execution, execute a writ, serve a summons, or make an arrest, all acting under a solemn, official oath, though as pure in duty as a saint and as immaculate as a seraph, for a mere error of judgment, they are liable . . ." (Cong. Globe, 42nd Cong., 1st Sess. 365 (1871))

In fact, there is little solace for respondent in this comment. First, Congressman Arthur was an opponent of the Ku Klux bill and was exaggerating its scope in an effort to scuttle it. Second, contrary to Mr. Arthur's politically motivated prognostications this Court has held judges and legislators absolutely immune from damages and governors and sheriffs immune from damages when their intentional conduct is in good faith. Third, mere errors in judgment have never been held actionable under section 1983, either by this Court or any lower federal court. Strict liability has not been reached under section 1983. No court has yet so held nor is it a certified question in our case.

By way of contrast, a supporter of the bill, Congressman Ellis H. Roberts, in discussing the factors which showed the necessity for the Ku Klux Act stated:

> "These, then, are no common crimes. They are not a sporadic, accidental, scattering; . . . They

are *deliberate, systematic,* instigated from a common source, seeking a common end." (Emphasis added). Cong. Globe, 42nd Cong., 1st Sess. 412-413.

Thus, it was the intentional, not the negligent depredations of the Klan and their accomplices in state and local government which was the evil the Act sought to correct. We submit that the legislative history of section 1983 confines its coverage to intentional conduct and its nonfeasance analogue, deliberate indifference.

In his brief, respondent Navarette also exhaustively summarizes a string of lower federal court decisions which assertedly support his view that negligence states a cause of action (RB 27-43.)[2] These lower court decisions are inapposite. With one exception,[3] all typically required more than simple negligence to find a federal claim stated. Moreover, the cases cited precede the more recent trend in the federal courts rejecting negligence as a basis for section 1983 liability and limiting the statute to intentional conduct, including deliberate indifference.[4]

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[2]Amicus engages in a similar exercise (A.C. Br. 20-22). As to the decision primarily relied upon (*Roberts v. Williams*, 456 F.2d 819 (5th Cir. 1971), amicus fails to point out that it was later modified to delete negligence as a basis of liability under section 1983: "We modify our opinion so as to declare that the liability of the defendant, Arterbury, rests upon Mississippi law applied under the doctrine of pendent jurisdiction." 456 F.2d 835.

[3]*McCray v. Maryland*, 456 F.2d 1, 5-6 (4th Cir. 1972), but see *Bowring v. Goodwin*, 551 F.2d 44, 48 (4th Cir. 1977), discussed below, note 4.

[4]In addition to the cases cited in our opening brief (Pet. Br. 18 n.26), the following recent decisions confine section 1983 to intentional conduct and reject negligence as a basis for a cause of action. *Smart v. Villar*, 547 F.2d 112 (10th Cir. 1976); *McDonald v. State of Illinois*, 557 F.2d 596, 601 (7th Cir. 1977); *Little v. Walker*, 552 F.2d 193, 198 n.8 (7th Cir. 1977); *Bass v. Sullivan*, 550 F.2d 229 (5th Cir. 1977); *Bowring v. Goodwin*, 551 F.2d 44, 48 (4th Cir. 1977); *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077, 1080-1081 (3rd Cir. 1976).

It is noteworthy that in *Hampton*, the Third Circuit has retreated from its earlier view that "culpable negligence" stated a 1983 claim (*Howell v. Cataldi*, 464 F.2d 272, 279 (3rd Cir. 1972). *See Jones v. McElroy*, 429 F.Supp. 848, 861-863 (E.D. Pa. 1977). Similarly, in *Bowring*, the Fourth Circuit limits section 1983 liability to deliberate indifference, not negligence, and does not discuss its earlier cases (*McCray v. Maryland, supra; Jenkins v. Averett*, 424 F.2d 1228 (1970)), holding that negligence or gross negligence states a cause of action.

We believe, however, that the essence of Navarette's position is that *Monroe v. Pape* [365 U.S. 167] sanctions a 1983 cause of action in negligence (RB 13-15). This was also the view of the Court of Appeals (App. Pet. vi-viii). For the reasons stated in our opening brief (Pet. Br. 8-9, 11-12), *Monroe* is clearly distinguishable. But if this Court agrees with those who suggest that much of *Monroe* has already been overruled *sub silentio* in *Estelle v. Gamble* [429 U.S. 97] and *Paul v. Davis* [424 U.S. 693], then it would not be inappropriate to do so unequivocally.

Amicus argues that this Court should construe respondent Navarette's complaint as one alleging deliberate indifference and remand the case for trial (A.C. 4). Amicus betrays his unfamiliarity with the case. The complaint in the first and second causes of action already alleges deliberate refusal to send the mail. There is no need for the Court to create such a claim by construction. The question is whether respondent will also have an alternative theory of negligence to fall back on before a jury if he cannot show refusals amounting to deliberate indifference.

Amicus also argues that the qualified immunity [created by this Court] for good faith acts of public officials is incompatible with the objective concept of negligence. (A.C. 16, 17). We agree. (Pet. Br. p. 12). But then he asserts that therefore this Court's cases delineating that qualified immunity are inapposite. In this he is mistaken. We again submit that "the subsequent recognition of a qualified immunity . . . based on good faith demonstrates that intentional conduct was the focus of section 1983 . . ." Pet. Br. p. 12. Our point was that this Court has thus far confined section 1983 to intentional acts.[5] We cannot instruct amicus further.

Amicus then argues that *Wood v. Strickland,* 420 U.S. 308 (1975) imports a "reasonable man standard" or an objective element into the concept of good faith. A.C. Br. page 10. We agree. Pet. Br. page 19. But amicus further asserts this means that this Court has sanctioned negligence actions under section 1983. We think not. The *Strickland* concept was expressly confined to intentional acts resulting in a deprivation of "basic unquestioned constitutional rights." 420 U.S. at 322.[6]

[5] *Wood v. Strickland* involved intentional conduct, not negligence. 420 U.S. at 310. The same is true of *Pierson v. Ray* [386 U.S. 547]; *Scheuer v. Rhodes* [416 U.S. 232] and *O'Connor v. Donaldson* [422 U.S. 563].

[6] A number of courts and commentators seem to agree with the position taken in our opening brief that "no constitutional right is 'clearly established' until first articulated by this Court and then a reasonable period of time for dissemination of this Court's ruling is permitted" (Pet. Br. 20). *See,* Note, *The Supreme Court, 1974 Term,* 89 Harv.L.Rev. 1, 224 n.38-39, 225 n.40-41 (1975), and cases there collected. Whether a right is "clearly established" is properly a question of law to be decided by the court. *Id.,* at pp. 222 n.29, 223. See also *Sapp v. Renfroe,* 511 F.2d 172, 178 (5th Cir. 1975).

The position of amicus confuses two discrete concepts: the application of the reasonableness standard to limit the extent of subjective good faith immunity where the result was intended and the use of the same standard to determine liability where the factual result was not intended.

"Negligence is conduct and not a state of mind." W. Prosser, *Law of Torts,* page 145. A reasonable man test is applied in negligence law to assess the quality of the actor's conduct when it produces an unintended factual result: injury to another. If the conduct was unreasonable in light of the risk of harm, the actor is deemed negligent.

Qualified immunity on the other hand, is concerned with the actor's state of mind: his good faith. The objective reasonableness element of the immunity standard has only limited application. The question to which it is applied is not whether the actor's conduct is reasonable in light of the unintended factual harm produced; but whether the actor's asserted lack of knowledge of the legal (constitutional) consequences of his conduct is intolerable and therefore unreasonable when the precise factual result he intended has occurred.

Given a frame of mind amounting to subjective good faith, under *Wood v. Strickland,* only when intentional conduct results in the deprivation of "settled, indisputable" constitutional rights does the re-

quired objective component override subjective innocence and impose liability under section 1983. 420 U.S. at 322. Thus, the degree of ignorance condemned in *Strickland* is comparable to and compatible with the quantum of inaction condemned as deliberate indifference in *Estelle v. Gamble*. In both cases the actor intends the factual result or at least acts in such disregard of the factual consequence as to constitute a deliberate indifference to that result and its constitutional consequences.

CONCLUSION

We respectfully submit that the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Dated, San Francisco, California,
September 27, 1977.

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